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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 453

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

WABASH RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND ILLINOIS TERMINAL RAILROAD COMPANY; A. E. STALEY MANUFACTURING COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

A. E. Staley Manufacturing Company, intervener appellee, petitions for a rehearing, pursuant to Rule 33, of the decision entered March 27, 1944, reversing the decree

of the statutory court below; and in that behalf petitioner states:

Petitioner does not seek reconsideration or modification of the two basic conclusions stated by the Court and asks that the Court shall clarify its decision and modify the terms, to the end that the decree of the Court below shall not be reversed nor the underlying orders of the Interstate Commerce Commission confirmed.

First, petitioner accepts the decision of March 27, 1944, as reaffirming the doctrines of *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, that the Commission has authority to determine "what is embraced within the service of transportation and what lies outside that service"; where the transportation begins and ends, or what constitutes a reasonably convenient place for receipt and delivery of freight at plants, large or small; further, that each case must be determined upon the particular facts, within the Commission's discretion exercising its administrative powers. As explained below, petitioner questions whether the Court intends to hold that the Commission may declare transportation ended at a place inaccessible to the consignee and contrary to express statutory provisions.

Second, petitioner accepts the Court's conclusion that these matters are determined by Section 6 (7) of the Interstate Commerce Act, so that the Commission's order which in substance requires assessment of a spotting charge against Staley is not invalid because such charge has not been required also at competing plants under like circumstances.

Petitioner is asking the Court to consider a question presented in brief and argument, not reviewed in the Court's opinion and which involves important matters of

fact that are not correctly reflected in the opinion of the Court.

This question relates to clauses in the Commission's findings, incorporated in its order, which prohibit respondent carriers from according Staley any delivery of carload freight beyond a point in the general yards of the Wabash Railroad, a substantial distance away from the Staley plant. This is error, under the *American Sheet & Tin Plate* doctrine; and the error is of peculiar force as related to the large grain traffic moving to and from the Staley merchant elevators. The effect of the Commission's order is to deny Staley Company any delivery of grain under the freight rate.

I.

The Court's opinion after referring to the size of the Staley plants and the movement of cars between the interchange tracks and points of loading and unloading (under former methods), recites (pp. 4-5):

> "Contentions of appellees based on a formal change of control of the interchange tracks by lease from the Staley Company to appellee Wabash Railroad executed subsequent to the Commission's report in *Ex parte* 104, are irrelevant to our present inquiry. After the lease, as before, they continued to be used as interchange tracks and the controlling question is whether the movement from the interchange tracks to points of loading and unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here.
>
> "Appellees make no other serious contention of want of evidentiary support for the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court found no such lack."

The facts are not as stated but have changed, see below. Nowhere in the opinion is there discovered recognition of the fact that the interchange tracks *are no longer in existence,* and no placements are first made thereon, but all cars, whether grain or other freight, move to and from Wabash Railroad yards from and to various unloading or loading points within the Staley plant.

The Commission's findings and conclusion appears to have been skillfully drawn so as to require continued imposition of the $2.50 charge on cars moving *directly* to and from the Staley plant, even as to the grain which is simply shunted in strings of ten or more cars and subsequently placed by Staley at its elevator chutes through the medium of plant-operated car pullers. The findings read (R. 43) (*our italics*):

> "2. That all services between the Burwell yard *or the storage or general yard of the Wabash* and points of loading or unloading within the plant area of the Staley Company are plant services for the Staley Company and not common-carrier services covered by the line-haul rates and charges of respondent carriers.
>
> "3. That the performance by respondents, without charge in addition to the line-haul rates and charges, of service (a) from Burwell yard tracks to points of unloading within the plant area of the Staley Company (b) from points of loading within said plant area to Burwell yard tracks on loaded cars moved to that yard, and (c) from points of loading within said plant area *to Wabash storage or general yard tracks* on loaded cars that do not move to the Burwell yard, would result in the Staley Company receiving a preferential service not accorded to shippers generally and would result in the refunding or remitting of a portion of the rates and charges collected or received as compensation for the transportation of property in violation of section 6 (7) of the act."

As a matter of law, which only this Court may finally determine petitioner must concede that perhaps there is

some testimony that would support a finding that as to general commodities there may be services of car movements within the Staley plant which are not carrier services. But this is certainly not so as regards grain to (and from) the elevator. These ~~more~~ move direct from the railroad inspection tracks in their yards to a point just off the Wabash right of way in the Staley plant. (R. 256)

There was an important change in the facts subsequent to the last hearing by the Commission, April 23, 1940 (R. 370), and prior to the final order of May 6, 1941. This change was the discontinuance of any and all use of the interchange tracks (known as Burwell yards) and later the removal of those tracks, which no longer have physical existence. Not only was the cessation of use called to the Commission's attention in printed exceptions preceding its final report; this and the dismantling of the tracks was made the express subject of petitions for rehearing by the respondent carriers and by the Staley Company: By the Illinois Central (R. 51); the Wabash (R. 61); by Staley (R. 69). These petitions for rehearing the Commission denied by order of July 31, 1941 (R. 8) before the suit to set aside its order was instituted.

II.

In the brief for intervener-appellee, under point II, the Court's attention was invited to the effect of the provisions of the constitution and statute of the State of Illinois (supplementing Federal law), requiring inspection of grain moving by railroad and requiring also the delivery of the grain by the carrier to any elevator, physically accessible to railroad locomotives. Further, notice was called to the application of the doctrines of this Court in *Great Northern*

Railway Company v. *Merchants Elevator Company*, 259 U. S. 285, to the facts of this present case.

Petitioner is mindful that in *United States* v. *American Sheet & Tinplate Co.* case, *supra*, the Court said:

> "There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service."

The Court also said:

> "It is conceded that the line-haul rate covers delivery."

The requirements of the statutes as to grain inspection and delivery in Illinois (as indeed in other states) are incompatible with any suggestion or claim that the railroads have not universally made deliveries at unloading chutes of elevators. Accordingly, whether or not the Illinois statutes and constitution may be held of binding force against the Interstate Commerce Commission, petitioner urges that the Court should accept such requirements of law, fortified by the abundant testimony of this record, as establishing that with respect to grain there is undoubtedly a general custom and usage amounting to a rule of law. This custom is that after required state inspection in railroad yards, the cars of grain are placed at the elevator under the compensation furnished by the freight rate. *This is universally true.*

In this case, Staley is being required to pay $2.50 per car charge (not imposed on any other grain concern by respondent carriers) where the railroads simply deliver strings of cars of grain clear of their property on tracks just within the plant leading to the elevator and later Staley completes the movement by car puller device to the unloading chutes.

In *Great Northern Railway Co.* v. *Merchants Elevator Co., supra,* the Court concluded, as a matter of law, that in construing a railroad tariff under Section 6 of the Act, the inspection point is not the real destination of a shipment of grain, but the elevator where the grain is subsequently unloaded. It will be noted, therefore, that the determination of what is the delivery point on grain involves construction of a statute, which is not an administrative function for the Commission but is a legal question for the courts.

After counsel for petitioners had urged this point on oral argument, counsel for the Government, in reply to a question from the bench, swept it aside with the remark that it had been raised at the last minute to confuse the record. The point was argued orally and in brief before the District Court in this case; and the facts were fully developed in the underlying record before the Commission.

III.

Petitioner would greatly hesitate to accept an interpretation of the doctrine of *United States* v. *American Sheet & Tinplate Co.,* reaffirmed in the present case to mean that the authority of the Commission to determine where transportation ends extends to declaring its termination at a point where *as a physical fact* the cars are inaccessible to the consignee at destination, or from a point of origin where the consignor could not get to the cars for loading. Particularly does this seem an undue stretching of the Court's recognition of the Commission power, when viewed in the light of the express provision of Section 1 (3) of the Interstate Commerce Act:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels,

and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Petitioner prefers to interpret the Court's conclusion as embodying the idea that the Commission's authority does not extend to disregarding usages and requirements of law, such as grain inspection statutes, or that the Commission is relieved of the need for having some substantial evidence that the place which it designates as marking the end (or beginning) of the transportation obligation is one where the shipper may actually take delivery and receive or tender the goods. Such place cannot be within a general railroad yard, as the Commission findings herein contemplate. As a matter of good sense, it would seem the transportation obligation, under the rate, must extend to a point at least immediately beyond the carrier's right of way. As a matter of law, strictly according to the substantive provisions of Section 6 of the Act, the principles of *Great Northern Railway Company* v. *Merchants Elevator Company, supra,* this is clearly the obligation with respect to grain.

IV.

The decree of the Court below and the contention of the appellees extended to the matters herein discussed; and these seem to be overlooked by this Court, particularly in the statements quoted from pp. 4-5 of the opinion, to the effect that there is no serious contention of want of evidentiary support of the Commission's order.

Petitioner prays that the Court will reconsider its re-

versal of the decree of the Court below and approval of the underlying order of the Commission and instead shall affirm the decree in part or remand with instructions for further proceedings in harmony with the Court's final conclusions.

Chicago, April 24, 1944.

Respectfully submitted,

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Attorneys for Intervener-Appellee.

AFFIDAVIT

I, John S. Burchmore, counsel for petitioner, A. E. Staley Manufacturing Company, certify that the foregoing petition is presented in good faith, is true and correct, and is not filed for delay.

JOHN S. BURCHMORE.

P. 1

SUPREME COURT OF THE UNITED STATES.

No. 453.—October Term, 1943.

The United States of America and Interstate Commerce Commission, Appellants, vs. Wabash Railroad Company, Illinois Central Railroad Company and Illinois Terminal Railroad Company.	Appeal from the District Court of the United States for the Southern District of Illinois.

[March 27, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The Interstate Commerce Commission, in a report and order supplemental to its main report in *Ex parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, 209 I. C. C. 11, has directed appellee railroads to cancel certain tariff supplements by which they propose to eliminate charges for spotting freight cars at the doors of factories in the industrial plant of appellee Staley Manufacturing Co., at Decatur, Illinois. The Commission based its order upon a finding that the performance without charge of the spotting service would be an unlawful preference because a departure from filed tariffs, in violation of § 6(7) of the Interstate Commerce Act. 49 U. S. C. § 6(7). On appellees' petition the District Court for Southern Illinois, three judges sitting, 28 U. S. C. § 47, set aside the Commission's order, 51 F. Supp. 141. It held that the Commission's conclusion that the free spotting service rendered at the Staley plant is an unlawful preference, was not supported by evidence, and that the Commission's order must be set aside because it results in discrimination contrary to §§ 2 and 3(1) of the Act, since it appears that similar free spotting service was being rendered to Staley's competitors against which the Commission had issued no order. The case comes here on appeal under 28 U. S. C. §§ 47a, 345. The principal question for our decision is whether,

as the District Court thought, the order is invalid because it results in a prohibited discrimination.

In *Ex parte 104*, the Commission initiated an extensive investigation of the service rendered by interstate railroads in spotting cars at points upon the systems of plant trackage maintained by large industries. After a study of the conditions at some two hundred industrial plants to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charge by the carriers, the Commission found that the freight rates had not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs. And it concluded that the performance by the railroads of such service, free, or the payment to the industries of allowances for its performance by them, is in violation of § 6(7) of the Act.

The Commission, in its main report in *Ex parte 104*, recognized that by railway tariff practice in this country the rates on carload traffic moving to or from any city or town apply to so-called "switching" or "terminal" districts and entitle each industry within such a district to have the traffic delivered directly to and taken from its site. By this method of delivery and by use of private tracks of the industry the railroads are saved the expense of maintaining more extensive terminal facilities, the service and cost of delivery within the switching district being comparable to that of delivery on team tracks or sidings or at way stations. But in the case of large industries having extensive plant trackage the Commission found that cars hauled to the industry usually come to rest at nearby interchange tracks, after which the intraplant distribution of the cars is made at times and in a manner to serve the convenience of the industry rather than that of the carrier in completing its transportation service.

In determining in such circumstances the point at which the carrier service ends and the service in placing the cars so as to meet the convenience of the industry begins, the Commission stated that the line of demarcation "should be drawn at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires,

or disabilities of a plant", 209 I. C. C. at 34. It added, "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, . . . the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. . . ." 209 I. C. C. at 44-5.

The application of such a test obviously requires an intensive study of traffic conditions prevailing at the particular plant at which the spotting service is rendered. It is for this reason that the Commission, in carrying into effect the principles announced in *Ex parte 104*, has found it necessary to proceed to a series of supplemental investigations of the spotting service rendered at particular plants. Accordingly the Commission made no order on the foot of its main report, but following a series of supplemental reports, including the present one, each detailing the facts found as to the spotting service rendered at the particular plant investigated, the Commission has made cease and desist orders, applicable to that service, a number of which this Court has upheld on review. See *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156. In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence. *United States* v. *American Sheet & Tin Plate Co., supra*, 408; *United States* v. *Pan American Petroleum Corp., supra*, 158; *Interstate Commerce Commission* v. *Hoboken Mfrs. R. R. Co.*, 320 U. S. 368, 378 and cases cited.

In this, as in its earlier supplemental reports, the Commission has examined the actual conditions of operation at the industrial plant in question, here the Staley plant, and has found these conditions to be similar in type to those held sufficient to support its

orders in *United States* v. *American Sheet & Tin Plate Co., supra,* and *United States* v. *Pan American Petroleum Corp., supra.*[1] It made an extended examination of car movements within the plant area of the Staley Company, which extends for a distance of about two and a quarter miles, includes some forty buildings used in the manufacture of various products, principally from corn and soy beans, and contains approximately 20 miles of track, having 18 points at which freight is loaded or unloaded. It found that inbound cars are in the first instance placed upon interchange tracks from which they are later spotted at the points of loading and unloading, a service requiring in numerous instances two or more car movements performed by engines and crews regularly and exclusively assigned to it; that the interchange tracks are reasonably convenient points for the delivery and receipt of cars; that the movements between the interchange tracks and the points of loading and unloading are not performed at the carrier's convenience but are "coordinated with the industrial operations of the Staley Company and conform to its convenience"; that the service beyond the interchange points is in excess of that involved in switching cars to a team track or ordinary industrial siding or spur, and is consequently not a part of the transportation service which ends at the interchange tracks.

Contentions of appellees based on a formal change of control of the interchange tracks by lease from the Staley Company to appellee Wabash Railroad executed subsequent to the Commission's report in *Ex parte 104,* are irrelevant to our present inquiry. After the lease, as before, they continued to be used as interchange tracks and the controlling question is whether the movement from the interchange tracks to points of loading and

[1] The Commission examined the conditions at the Staley plant in a supplemental report rendered May 22, 1936, in which it directed the carriers, appellants here, to abandon the practice of paying allowances to Staley for the performance of the spotting service. A. E. Staley Mfg. Co. Terminal Allowance, 215 I. C. C. 656. An action to enjoin enforcement of that order was voluntarily dismissed without prejudice as a result of this Court's decision in the Tin Plate, Pan-American Petroleum, and other cases sustaining similar orders. Thereupon the payment of allowances was abandoned, and the carriers assumed the performance of the spotting services, establishing a charge of $2.27 per car, later increased to $2.50. By schedules filed to become effective December 15, 1939, the carriers proposed to cancel the spotting charge. In the present proceeding the Commission has refused to approve the proposed schedules, and has likewise refused, after having reopened the proceedings in Staley Mfg. Co. Terminal Allowance, *supra,* to modify its prior order. 245 I. C. C. 383.

unloading is a plant service for the convenience of the industry, or a part of the carrier service comparable to the usual car delivery at a team track or siding. The Commission's finding that it is a plant service is supported by evidence and must be accepted as conclusive here.

Appellees make no other serious contention of want of evidentiary support for the Commission's conclusion that the carrier service ended at the interchange tracks and the District Court found no such lack. Their contention, upheld by the court below, is that the Commission's order cannot be supported merely by the circumstances disclosed by the evidence respecting the operations at the Staley plant, but that its validity must turn upon a comparison of the conditions at the Staley plant with those at competing plants. They urge further, and the District Court so held, that, as it appears from the record that similar spotting service is being rendered at competing plants, the Commission's order compels appellees to discriminate against Staley, contrary to §§ 2 and 3(1).

This argument ignores the nature of the present proceeding which is to enforce § 6(7), not §§ 2 and 3(1). Section 6(7) prohibits departures from the filed tariffs and it is violated, as the Commission has pointed out, when carriers pay the industries for a terminal service not included in their transportation service or when they render such terminal service free of charge. This prohibition applies without qualification to every carrier and when, as here, the unlawfulness of the allowance or service is shown by the conditions prevailing at a particular industrial plant, it is unnecessary, in order to support the Commission's order, to consider whether generally similar allowances or services at other plants are, or are not, lawful under conditions prevailing there.

In this respect a proceeding under § 6(7) is unlike proceedings under §§ 2 and 3(1) which prohibit unjust discriminations and undue preferences. *United States* v. *American Sheet & Tin Plate Co., supra*, 406; *United States* v. *Hanley*, 71 Fed. 672, 673-4; compare *Merchants' Warehouse Co.* v. *United States*, 283 U. S. 501, 510-11. Since under these sections acts or practices not otherwise unlawful may be so because discriminatory or preferential, it becomes necessary to make comparisons between the different acts or practices said to produce the discrimination or preference, in

order to determine whether they are such in fact and whether they are unjust or undue. Differences in conditions may justify differences in carrier rates or service. In determining whether there is a prohibited unjust discrimination or undue preference, it is for the Commission to say whether such differences in conditions exist and whether, in view of them, the discrimination or preference is unlawful. See *Barringer & Co.* v. *United States*, 319 U. S. 1, 7-8, and cases cited.

The Commission's decision here, and its finding of a "preferential service", are not based and do not depend on a comparison of conditions at the Staley plant with those obtaining at others. By its fifth finding the Commission found that the spotting service rendered at the Staley plant was a service "in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks or industrial sidings and spurs", and hence in excess of that provided for by the tariff rates. It concluded in its third conclusion of law that the performance of this service without charge would result in receipt by the Staley Company of "a preferential service not accorded to shippers generally", and hence would result in a prohibited refunding or remitting of a portion of the filed tariff rates.

The Commission, after pointing out that evidence was introduced showing that spotting is performed without charge at various plants, some of which compete with the Staley Company, also found, "The evidence does not satisfactorily show that the circumstances and conditions under which the spotting is performed at such plants are substantially similar to those at the Staley plant. If it did it would only show the probability of existence of unlawful practices at such plants and the need for investigation in connection therewith." The District Court relied solely on this evidence to support its conclusion of lack of evidentiary support for the Commission's finding of a "preferential service not accorded to shippers generally" and to support its own finding that under the present order Staley is being discriminated against. For this reason it concluded that the Commission's order must be set aside.

We think that this is a mistaken interpretation of the Commission's findings and misapprehends their legal effect. If the Commission's reference, in its conclusion of law, to "a preferential service not accorded to shippers generally" means more than

the statement in the fifth finding of fact that the service is "in excess of that rendered shippers generally in the receipt and delivery of traffic at team tracks", it is obviously irrelevant to the present proceeding. For it could not serve to foreclose the legal conclusion to be drawn from the fifth finding that the free performance of the spotting service at the Staley plant is in violation of § 6(7) because of the traffic conditions found to prevail there. *United States* v. *American Sheet & Tin Plate Co., supra,* 406-7. But a reading of the Commission's report and findings makes abundantly clear that it was not concerned with discriminations or preferences between the Staley plant and others, such as are prohibited by §§ 2 and 3(1); that the "preference" to which it referred was not based upon a comparison of conditions at the Staley plant with those of others, but upon an application to the actual conditions at the Staley plant of the standards laid down in its report in *Ex parte 104*, in order to ascertain whether the service rendered there is in excess of that which the carriers are obliged to perform by their tariffs.

As the Commission and this Court have pointed out, a preference or rebate is the necessary result of every violation of § 6(7) where the carrier renders or pays for a service not covered by the prescribed tariffs. *Davis* v. *Cornwell*, 264 U. S. 560, 562. The Commission emphasized that no question of discrimination or preference prohibited by §§ 2 and 3 was involved in the present proceeding when it found that the evidence did not show that the circumstances and conditions under which the spotting is performed at other plants are substantially similar to those at the Staley plant, and that if it did that it would only tend to show that the practice was unlawful at the others as well. So far as the District Court found that the Staley Company was being discriminated against by the continuance of the service at other plants, its finding is irrelevant to any issue in the present proceeding which relates only to violations of § 6(7) and not §§ 2 and 3(1). In any case findings of discrimination or undue preference under §§ 2 and 3(1), as we have said, are for the Commission and not the courts. And the Commission has found that the evidence does not show that conditions with respect to the spotting service at the Staley plant and those of its competitors are similar.

While it is the duty of the Commission to proceed as rapidly as may be to suppress violations of § 6(7) in the performance of

spotting services, that is to be accomplished, as we have held, by an investigation of the traffic conditions prevailing at each particular plant where the service is rendered and not by comparison of the services rendered at different plants. Appellees complain of the Commission's long delay, some six years since the present proceeding was begun, in investigating spotting services rendered at the plants of Staley's competitors, but any of the appellees have been free to initiate proceedings to eliminate any unlawful preferences or discriminations affecting them if they so desired, § 13(1), and no reason appears why they could not have done so. There are other modes of inducing the Commission to perform its duty than by setting aside its order prohibiting a practice which plainly violates §6(7), because it has not made like orders against other offenders. The suppression of abuses resulting from violations of § 6(7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12(1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under § 6(7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 453.—October Term, 1943.

The United States of America and Interstate Commerce Commission, Appellants, *vs.* Wabash Railroad Company, Illinois Central Railroad Company and Illinois Terminal Railroad Company.	On Petition for Rehearing.

[May 8, 1944.]

Mr. Chief Justice Stone.

In its petition for rehearing appellee Staley Manufacturing Co. for the first time calls to our attention certain alleged changes in the location and arrangement of tracks on which are placed cars moving to and from the tracks of the line-haul carriers from and to Staley's industrial tracks. The changes are alleged to have occurred after the submission of the case to the Interstate Commerce Commission and are said to call for a different conclusion than that reached by the Commission as to whether the spotting service now performed by Staley is a part of the service covered by the line haul tariffs.

The Commission's report considered in detail the circumstances attending the placing of cars at what are termed the Burwell tracks, which it found to be located within the Staley plant area and to have been leased by Staley to appellee Wabash Railroad Co. Its report states that in general, cars delivered to Staley were initially placed by the carrier on the Burwell tracks and thence switched to appropriate unloading points at the Staley plant, while cars received from Staley were generally placed on the Wabash Railroad's general or storage tracks, but were also sometimes placed on the Burwell tracks. The Commission found, on sufficient evidence then before it, that "the movements between points of loading or unloading within the plant area of the Staley Company and the Burwell yard, the storage yard, or the general yard

of the Wabash . . . in all instances are, and must be, coordinated with the industrial operations of the Staley Company and conform to its convenience." And in its second conclusion of law it stated that "all services between the Burwell yard or the storage or general yard of the Wabash and points of loading or unloading within the plant area of the Staley Company are plant services for the Staley Company and not common-carrier services covered by the line-haul rates and charges of respondent carriers".

By their petitions for rehearing addressed to the Commission, appellees alleged that since March 1, 1941, three months after the case had been submitted to the Commission and about two months before it rendered its decision, the use of the Burwell tracks had been discontinued, and that those tracks had thereafter been disconnected and were being dismantled. They further alleged that appellee Wabash Railroad was in course of constructing new tracks on its own property "adjacent to its yard tracks north of the Staley plant" and "immediately north of the so-called Burwell yard" for use in the interchange of cars with Staley and other shippers, and that meanwhile the interchange was being performed from its general or storage yards. Appellees moved respectively that the Commission reconsider its decision "upon such further proceedings as may be appropriate and necessary", and that "the case be set down for a further hearing, and that . . . the Commission reconsider its order". No evidence was specified or tendered to prove before the Commission the allegations of the petitions for rehearing, and no opportunity to introduce evidence was in terms requested. The Commission denied the petitions for rehearing without opinion.

Before the District Court appellees set out the substance of their petitions to the Commission for rehearing and urged that the Commission erred in denying them. The United States in its answer admitted only that appellees had alleged in those petitions for rehearing the matters set forth; the truth of the matters alleged was not admitted by either appellant. No new evidence was taken in the District Court. That court did not pass on this question, and made no findings as to the extent or effect of the alleged change of conditions.

Nothing in the petitions to the Commission for rehearing or the petition here affords any basis for saying that the alleg changes in conditions are of a character which would require any modification of the Commission's order or that appellees could not,

with due diligence, have brought the changes to the attention of the Commission before it made its report. They were not referred to in appellees' briefs in this Court. Compare rule 27, paragraphs 4 and 6; *I. T. S. Co.* v. *Essex Co.*, 272 U. S. 429, 431-2; *Flournoy* v. *Wiener*, No. 252, decided February 28, 1944, p. 6. Neither the Commission nor the District Court have made findings with respect to them and they were not considered by this Court or referred to in its opinion.

We find nothing in the record or in the petition before us which calls on the Court in the present proceeding to pass on the question now sought to be raised. Our decision is accordingly without prejudice to appellees' presentation in any appropriate proceeding before the Commission and the courts, of their contention that as a result of changed conditions after the case was submitted to the Commission, the spotting service as now performed is not in excess of the carriers' obligation under their tariff rates, and that its performance by the carriers without charge is therefore not unlawful.

The petition for rehearing is denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.